United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

NO. 75-1154

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EDWARD ZUBER, et al.

Defendant-Appellant.

On Appeal from the United States

District Court, Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT,

EDWARD ZUBER

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ARGUMENT[1]

A. INTRODUCTION.

The Government contended, inter alia, that severance in this case would have imposed an undue burden on judicial economy. In support of that argument, the Government points out that 32 witnesses and approximately 335 exhibits were presented in this case which consumed 9 days of trial.[2] As noted in the Government's Statement of Facts (pp. 4-26, Government's Brief), very little of the case involved Mr. Zuber. Of those 32 witnesses, only 4 offered any tesimony relevant to Mr. Zuber.[3] Of the 335 exhibits introduced in evidence, only one was relevant to Mr. Zuber.[4]

The sole issue relating to Appellant Zuber was the question of whether he had the requisite knowledge of the manipulative nature of the scheme. The evidence against him could have been elicited in less than one-half trial day. The rest of the evidence either did not bear on the Appellant Zuber's guilt or innocence, or was not at issue. In that regard, Appellant Zuber offered to stipulate to the great

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[1] Appellant Zuber seeks to respond herein only to the question of whether the trial court erred in failing to grant Appellant Zuber's motion for severance. Other issues will be addressed at the oral argument.

[2] The case went to the jury after merely 7 days of trial.

[3] The witnesses were: (1) Burney Acton; (2) Michael Clegg; (3) Michael Gardner; and (4) Alan Grant.

[4] Government's Exhibit 63B (the option agreement).

bulk of the prosecution's evidence in its pretrial motion for severance. (See Appellant Zuber's Opening Brief, p. 33.) As a result, very little was to be saved in terms of judicial economy, when balanced against the Appellant Zuber's need to present exculpating testimony from a co-defendants whose Fifth Amendment privilege prevented him from calling them to the witness stand.

B. THERE WAS AN ADEQUATE SHOWING THAT CO-DEFENDANTS WOULD TESTIFY BELOW, AND THAT THEY WOULD TESTIFY AT A SUBSEQUENT TRIAL.[5]

The Government places great significance on the fact that none of the defendants attempted to call co-defendant Segal, and that none approached the Bench to request a hearing on this "issue" outside of the presence of the jury. (Government's Brief, p.42.) The simple answer, of course, is that the Fifth Amendment privilege of defendant Segal precluded any of his co-defendants from calling him to the stand as a witness at their joint trial. Deluna v. United States, 308 F.2d 140 (5th Cir. 1952). Additionally, the Government argued that no basis was offered to support a finding that Segal would have waived his Fifth Amendment right to remain silent at a

[5] The Government does not claim an inadequate showing as to co-defendant Finkelstein, but only as to co-defendant Segal. Accordingly, this brief addresses itself solely to the question of the showing as to co-defendant Segal.

separate trial. (Government's Brief, p. 42.)

A reading of the Government's brief seems to imply that the question of whether Mr. Segal would testify was not addressed to the trial court. Such reading is incorrect. First, the record clearly reflects that Mr. Segal's counsel, in open court, not in the presence of the jury, stated to the Judge that Mr. Segal would not take the stand. That statement effectively precluded any co-defendant from calling Mr. Segal as a witness. Deluna, supra. Additionally, counsel for Appellant Zuber stated in open court in the presence and with the concurrence of co-defendant Segal and his attorney, both that Mr. Segal would testify on Mr. Zuber's behalf if the trials were severed, and the substance of the testimony he would give. (JA 1118.)[6]

The only requirement in this regard is that the trial court be satisfied of a bona fide intent or desire to have a co-defendant testify. Byrd v. Wainwright, 248 F.2d 1017 (5th Cir. 1970). Formal testimony of defense counsel, under oath, or an affidavit from one, is unnecessary, although it was supplied in this case. Byrd v. Wainwright, supra. Additionally, both the desire to have the testimony of co-defendant Segal, as well as the substance of his testimony, was stated in open court before both Mr. Segal and his counsel. At no time in the proceedings below did the Government contest

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[6] JA refers to Joint Appendix.

the bona fide nature of the Appellant Zuber's desire to have co-defendant Segal testify on his behalf. Consequently, Appellant Zuber has more than met the minimal requirements that he establish a bona fide intent to have his co-defendant testify. Byrd v. Wainwright, supra.

C. THE UNAVAILABILITY TO CALL CO-DEFENDANTS FINKELSTEIN AND SEGAL AS WITNESSES RESULTED IN SUBSTANTIAL PREJUDICE.

1. Segal.

The proferred testimony of co-defendant Segal relates to two key areas of testimony. The first deals with the question of when Zuber and Segal met for the first time. The second concerns an alleged telephone conversation between co-defendant Michael Clegg, speaking in California in the presence of Zuber, with co-defendant Segal (alleged to be in New York at the time). Contrary to the Government's contention, the evidence was not merely cumulative, but in fact, dispositive on the question of credibility of two key witnesses. The date of Segal's first meeting with Zuber bears heavily on the transaction with furrier Alan Grant that formed the basis for Zuber's sole conviction. That transaction took place on January 10, 1970. The testimony of Michael Gardner seems to place the first meeting between Zuber and Segal in early January, at or about the time of the transaction with

furrier Grant. (JA 798, 802.) Segal alone, and no other witness, was in a position to rebut the testimony of Gardner that he first met with Zuber in late December or early January. Segal's testimony would be that it was "well after" January 10th when he first met with co-defendant Zuber. (JA 1113.)[7] The impact of the proferred Segal testimony, along with that infra, is clearly exculpatory. It blunts the adverse inference to be drawn from the testimony of Michael Gardner that Zuber met with Segal on or about the very day of the transaction with furrier Alan Grant, the transaction which formed the basis of the sole count upon which Appellant Zuber was convicted.

Similarly, Segal's testimony as to the alleged Clegg - Segal telephone call was not merely cumulative. According to the Government's theory of proof, Clegg placed a call from his home in California in Zuber's presence to co-defendant Segal in New York. It is true that witness Michael Gardner testified that Segal was in Florida during that period except for four or five days. (JA 818.) However, the testimony of Gardner left the door open for the jury to infer that the telephone call may have taken place during the four or five days when Segal was not in Florida.

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[7] The Government's Brief, in an apparent misstatement, indicates that Segal would testify he first met Zuber on January 10th. (Government's Brief, p. 48.) The representation at trial clearly establishes that Segal's testimony would be that he met Zuber "well after" January 10th. (JA 1118.)

Segal alone was in a position to close that door and prove the lie of the witness Michael Clegg. Only Segal could testify that he was in Florida during the entire Christmas holiday period when Clegg alleges he made the telephone call in question to Segal at his office in New York. (JA 593, 595.)

The combined impact of the two areas in which Segal could have testified on Zuber's behalf are dramatic. Without his testimony the record appears to establish contacts between Zuber and Segal during the period late December through early January, the sole period in which Zuber is alleged to have had any active participation in the manipulative scheme. Only Segal could establish at trial that he never met nor communicated with Appellant Zuber until "well after" the period of time preceding the transaction with furrier Alan Grant.[8]

2. Finkelstein.

Once again, the Government contends that the proferred testimony of co-defendant Finkelstein is merely cumulative to that of Government witnesses Burney Acton and Michael Clegg. Of course, that is not the case. The reason is that Finkelstein

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[8] The Government consistently injects into its argument allegations that certain witnesses were not cross-examined as to certain areas of their testimony. (Government's Brief, pp. 47, 48, 53.) Of course, the question of trial tactics is irrelevant to the issue of whether Appellant Zuber was improperly denied a severance. The very areas about which the Government contends no cross-examination took place are precisely those areas of evidence Appellant Zuber's co-defendants Segal and Finkelstein were prepared to rebut.

was the link between Segal in New York and Acton and Clegg on the West Coast. Once again, Finkelstein alone was the sole witness who could testify what Zuber was told or was not told regarding the manipulative nature of the scheme.

Without the testimony of Finkelstein, the jury was free to rely on the inference that, since Zuber and Finkelstein were operating together during a portion of the period alleged, Finkelstein had told Zuber about the manipulative scheme. In fact, the Government relies on that precise inference in support of its argument of the overwhelming nature of Appellant Zuber's guilt:

> ". . . and given the joint activities of Zuber and Finkelstein in Pioneer stock, the jury would have had firm basis to infer that Finkelstein, indeed, had told Zuber about the full manipulative scheme, just as Segal had told him." (Government's Brief, p. 51.)

The Government has thus framed the issue as squarely as possible. Without Finkelstein's testimony, the jury could only infer that since Zuber and Finkelstein operated together, Zuber must have known all that Finkelstein knew. Only Finkelstein was in a position to rebut that inference by positive direct testimony.

Additionally, the Government apparently seeks to impose a new standard for examining the question of severance, that being the question of whether the proferred testimony could

be impeached by prior statements. (Government's Brief, p. 50-51.) First, there is nothing inconsistent between the prior statements of Finkelstein regarding his knowledge of the manipulative scheme and the proferred testimony of Finkelstein that Zuber was unaware of the manipulative nature of the scheme. More importantly, the fact that Finkelstein may have made prior statements -- consistent or otherwise -- is a matter that goes only to the weight of his testimony, and one to be decided by the trier of fact. It does not bear on the question of whether the severance should be granted in the first instance, nor has the Government cited any authority to support such a proposition.

Finally, the Government relies on alleged overwhelming circumstantial evidence against Zuber which supposedly reduces any prejudice from Finkelstein's unavailability as a witness. It relies primarily on the transaction at which Zuber was present with furrier Alan Grant, which formed the basis for Zuber's conviction. (Government's Brief, pp. 51-52.) In that regard, the Government relies heavily on the Option Agreement as reflecting the dual purpose of furthering Segal's scheme to keep Pioneer off the market and to induce Grant into believing the stock would maintain its high value. Left unsaid is the fact that the Option Agreement is also consistent with an innocent purpose and honest good faith belief; that is, that the defendant Zuber, in

fact, believed the stock would maintain its high value, possibly rise, and therefore permit Zuber to repurchase the stock at a profit.

Additionally, the Government relies on the alleged testimony of furrier Grant that a fraudulent omission was made in that neither Zuber nor Finkelstein told Grant that Pioneer was not in operation. (Government's Brief, p. 52.) However, the testimony was clear at trial that although Grant was unsure of who told him at the meeting, he definitely recalls one of those present telling him that they were waiting for an important piece of equipment to get the mine in full operation. (JA 934-935.) The Grant transaction then forms the basis for the conviction of Count 29. In and of itself, standing alone, there is nothing inherently unlawful about that transaction. Its unlawful nature necessarily flows from the inferences to be drawn regarding Appellant Zuber's knowledge of the fraudulent and manipulative nature of the Pioneer stock scheme. That knowledge, to a large extent, flows from the inferences to be drawn from the proximity and joint activities of Appellant Zuber and co-defendant Finkelstein. Finkelstein alone was in a position to offer direct testimony to rebutt that inference.

D. SUMMARY.

The heart of the problem is this. The key question at trial was whether Appellant Zuber had the requisite knowledge

of the manipulative nature of the stock scheme. As is common in such cases, the Government presented no affirmative, direct evidence bearing on Zuber's state of mind. To a very large extent, the Government relied upon circumstantial evidence and the joint activities of Zuber with Finkelstein on behalf of co-defendant Segal. Although Government witnesses Acton and Clegg were capable of testifying as to their conversations with Appellant Zuber, their testimony was not dispositive of the question of knowledge. Only co-defendants Finkelstein and Segal were in a position to testify positively, directly and affirmatively to facts exculpatory of Appellant Zuber. The crux of the matter is that without their testimony Appellant Zuber was denied even the opportunity to present such affirmative evidence relating to the question of knowledge.

Contrary to the Government's contentions, there was a firm and solid showing by both affidavit and statements in open court that co-defendants Finkelstein and Segal would testify at a separate trial of Appellant Zuber, but lacking such severance, they would both invoke their Fifth Amendment privilege and refuse to testify. That is precisely what happened. Without their testimony, Appellant Zuber was denied the opportunity to present that exculpatory testimony.

It is clear that the denial of that opportunity to present positive, affirmative exculpatory evidence is "substantially prejudicial," and severance should have been obligatory.

United States v. Martinez, 486 F.2d 15 (5th Cir. 1973);

United States v. Shuford, 454 F.2d 772 (4th Cir. 1971);

Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970);

United States v. Echeles, 352 F.2d 892 (7th Cir. 1965);

United States v. Kelly, 349 F.2d 720 (2nd Cir. 1965), cert. denied, 384 U.S. 947 (1966).

Respectfully submitted,

KIRSCHNER & GREENBERG

By Stanley I. Greenberg

Attorneys for Defendant-Appellant EDWARD ZUBER.

State of California)
County of Los Angeles) ss

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and notta party to the within above entitled action; my business address is 732 East Washington Blvd., Los Angeles, California. On the 5th day of September, 1975, I served the within Respondent's Reply Brief in the case of United States of America vs. Edward Zuber, Number 75-1154 on the persons interested in said action by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

John S. Siffert, Esquire (2 copies)
Assistant United States Attorney
United States Courthouse
Foley Square
New York, New York 10007

Appellant claims the three day mailing privilege under Rule 26, Federal Rules of Appellate Procedure.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on September 5, 1975 at Los Angeles, California.

Ann K. Zitlin

Ann K. Zitlin